

University of Massachusetts Law Review

Volume 12 | Issue 1

Article 5

January 2017

Keeping More than One Fish in the Sea: Why the Magnuson-Stevens Act Should Be Reauthorized

Joseph Marino IV

Follow this and additional works at: <http://scholarship.law.umassd.edu/umlr>

 Part of the [Commercial Law Commons](#), and the [Environmental Law Commons](#)

Recommended Citation

Marino, Joseph IV (2017) "Keeping More than One Fish in the Sea: Why the Magnuson-Stevens Act Should Be Reauthorized," *University of Massachusetts Law Review*: Vol. 12 : Iss. 1 , Article 5.
Available at: <http://scholarship.law.umassd.edu/umlr/vol12/iss1/5>

This Note is brought to you for free and open access by Scholarship Repository @ University of Massachusetts School of Law. It has been accepted for inclusion in University of Massachusetts Law Review by an authorized editor of Scholarship Repository @ University of Massachusetts School of Law.

Keeping More than One Fish in the Sea: Why the Magnuson-Stevens Act Should Be Reauthorized

JOSEPH MARINO IV

12 U. MASS. L. REV. 200

ABSTRACT

The American fishing industry has long been an important part of the economy. In time, overfishing led to restrictions on the industry through the Magnuson-Stevens Act. However, the Act has led to severe curtailments on fishing that have severely hampered the industry. This caused particular harm to the Northeast, resulting in a federally declared fishing disaster. This Note argues that the recently proposed revisions to the Magnuson-Stevens Act allow for a balance between protecting our oceans and allowing the fishing industry to thrive again. This would help the Northeast fishing industry properly recover while preventing any further tragedies of the common in the region.

AUTHOR NOTE

J.D. Candidate, May 2017, University of Massachusetts School of Law-Dartmouth.

I would like to thank John Quinn for his guidance and patience during the course of this Note and for his help in interpreting the Magnuson-Stevens Act. The author would like to thank the UMass Law Review E-Board for their support during this process, as well as the efforts of the editing team members for their hard work in reviewing this Note.

I. INTRODUCTION	202
II. HISTORY OF THE MAGNUSON-STEVEN'S FISHERIES CONSERVATION AND MANAGEMENT ACT.....	204
A. Magnusson-Stevens Fisheries Conservation and Management Act ..	204
B. Sustainable Fisheries Act.....	208
C. Reauthorization of Magnuson-Stevens Fishery Conservation and Management Act.....	211
III. THE INTRODUCTION OF BILL H.R. 1335-STRENGTHENING FISHING COMMUNITIES AND INCREASING FLEXIBILITY IN FISHERIES MANAGEMENT ACT.....	217
IV. SOLUTION.....	219
V. CONCLUSION	227

I. INTRODUCTION

From the moment the Pilgrims set foot in Plymouth, Massachusetts, the fishing industry was a boon to the regional economy.¹ The Atlantic Ocean provided a plentiful source of food that would become entrenched over the centuries in the minds and hearts of those in the region that would become known as New England.² The fish were so popular that the local Atlantic cod (*Gadus Morhua*)³ gained iconic status amongst the locals, where one need only visit the Massachusetts House of Representatives to understand the fish's importance.⁴ Even Cape Cod, the popular tourism destination, owes its name to the early fishing industry.⁵ The industry remains extremely relevant today; as of 2014, the Massachusetts ports in Gloucester and New Bedford were still ranked among the highest grossing ports in the United States.⁶

However, when a resource is used extensively by a region over a period of time without proper management, it is natural that resource

¹ See generally PILGRIM HALL MUSEUM, http://www.pilgrimhallmuseum.org/on_the_waterfront.htm [https://perma.cc/UJ9A-KE5W] (last visited Sept. 7, 2015) (discussing how cod and mackerel provided a good living as well as wealth for the colonists).

² See Peter Shelley, *The Magnuson Fishery Conservation and Management Act: Retrospect and Prospect: Article: The New England Fisheries Crisis: What Have We Learned?* [hereinafter *New England Fisheries Crisis*], 9 TUL. ENVTL. L. J. 221, 223 (1997).

³ FISHWATCH.GOV, NOAA, <http://www.fishwatch.gov/profiles/atlantic-cod> [https://perma.cc/9K5R-UFZ5] (last visited Sept. 7, 2015).

⁴ See *Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act: Hearing on H.R. 1335 Before the H. Comm. on Natural Resources*, 114th Cong. 3592, 3593 (2015) [hereinafter *Second Hearing on H.R. 1335*] (statement of Rep. Lynch) (“Massachusetts has a long and proud fishing industry. [I]n fact, the ‘sacred cod,’ a nearly five foot long woodcarving of an Atlantic codfish, has hung in the Massachusetts House of Representatives since 1794, representing the importance of the cod fishery to the commonwealth.”).

⁵ See CAPE COD CHAMBER OF COMMERCE, <http://www.capecodchamber.org/cape-cod-islands-history-and-travel-ideas-cape-cod-travel-guide> [https://perma.cc/75LX-BGF8] (last visited Nov. 16, 2015) (“It was England’s Bartholomew Gosnold who gave the Cape its name after the plentiful cod he found here in 1602.”).

⁶ *Fisheries of the United States 2014*, NOAA, 9 (Sept. 2015), <https://www.st.nmfs.noaa.gov/Assets/commercial/fus/fus14/documents/FUS%202014%20FINAL.pdf>. [https://perma.cc/WCF2-8FJ5].

depletion will occur.⁷ Addressing depletion was one of the goals of the Magnuson-Stevens Fishery Conservation and Management Act, which was first enacted in 1976⁸ (hereinafter “1976 Magnuson-Stevens Act”).⁹ As time passed, the law was reauthorized at approximately ten year intervals in the guise of different acts, each time adding more regulation to the fishing industry.¹⁰ These efforts have led to the fishing industry suffering and gasping for breath¹¹ as it tries to reclaim its historical standing as a significant member of the economy.¹²

Legislators across the country have taken it upon themselves to bring a bill before the U.S. House of Representatives designed to increase the amount that the fishing industry can catch as well as provide new science for the maintenance of fish stocks so as to avoid any further depletion of stocks.¹³ The amendments that H.R. 1335¹⁴

⁷ See Shelley, *supra* note 2, at 221-22.

⁸ See 16 U.S.C. § 1802(13)(a) (defining fishery as “one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics.”).

⁹ See David A. Dana, *Overcoming the Political Tragedy of the Commons: Lessons Learned from the Reauthorization of the Magnuson Act*, 24 *ECOLOGY L.Q.* 833, 840 (1997) [hereinafter *Overcoming the Political Tragedy of the Commons*] (stating that one of the two goals of the Magnuson Act was “to prevent fishery depletion”).

¹⁰ See generally Peter Shelley, *Taking Stock: The Magnuson-Stevens Act Revisited: Have the Managers Finally Gotten It Right?: Federal Groundfish Management in New England*, 17 *ROGER WILLIAMS U. L. REV.* 21, 23 (2012) [hereinafter *Magnuson-Stevens Revisited*] (“enactment of Sustainable Fisheries Act in 1996 and Magnuson Reauthorization Act in 2006” (citing Magnuson-Stevens Fishery Conservation and Mgmt. Reauthorization Act of 2006, Pub. L. 109-479, 120 Stat. 3575 (2007))).

¹¹ See generally Jonathan H. Adler, *Learning How to Fish: Catch Shares and the Future of Fishery Conservation*, 31 *UCLA J. ENVTL. L. & POL’Y* 150, 163 (2013).

¹² See generally *Fisheries Economics of the United States 2012*, NOAA, 13 (Feb. 2014), <https://www.st.nmfs.noaa.gov/Assets/economics/documents/feus/2012/FEUS2012.pdf> [<https://perma.cc/6GGC-7GBT>].

¹³ See *Second Hearing* on H.R. 1335, *supra* note 4, at 3593 (statement of Rep. Wittman) (“[T]he bill increases transparency and provides much-needed flexibility in the law for fishery managers to properly consider the environmental and economic impacts of decisions affecting fishing communities.”).

¹⁴ H.R. 1335, 114th Cong. (2015).

are proposing to the 1976 Magnuson-Stevens Act¹⁵ would benefit the economy of New England by avoiding another Tragedy of the Commons¹⁶ as the region continues to recover from a federally declared fishing disaster¹⁷ as well as providing new regulations for the science involved in sustaining the fisheries.¹⁸ In particular, there will be less strict regulations imposed on catch limits as a more flexible provision would be added.¹⁹ Part II of this Note provides the background of the 1976 Magnuson-Stevens Act, its various reauthorizations and why it was enacted.²⁰ Part III examines the proposed revisions of H.R. 1335 and what they would mean for the New England region.²¹ Lastly, Part IV offers what would be best for the region and ultimately why the revisions should be adopted.

II. HISTORY OF THE MAGNUSON-STEVEN'S FISHERIES CONSERVATION AND MANAGEMENT ACT

A. Magnuson-Stevens Fisheries Conservation and Management Act

The initial motivation for a federal act overseeing the fishing industry was born out of a desire to protect the oceans off the U.S. coast rather than a desire to regulate what fishermen could catch and land.²² As the American shores were being exploited by foreign fishing vessels, various attempts were made to enact different treaties and various other statutory changes but nothing seemed to slow the

¹⁵ Fisheries Conservation and Mgmt. Act, PUB. L. NO. 94-265, 90 STAT. 331 (1976).

¹⁶ See Dana, *supra* note 9, at 833-34 ("The standard account of the 'tragedy of the commons' involves the overexploitation of a common resource such as a forest or an ocean. . . the tragedy. . . results from the inability of resource harvesters, operating individually, to monitor and limit one another's harvesting efforts.").

¹⁷ *Second Hearing on H.R. 1335*, *supra* note 4, at 3593 (statement of Rep. Keating).

¹⁸ *Id.*

¹⁹ H.R. 1335, 114th Cong. § 5 (2015).

²⁰ See *Magnuson-Stevens Revisited*, *supra* note 10, at 23-34.

²¹ *Second Hearing on H.R. 1335*, *supra* note 4, at 3593 (statement of Rep. Keating).

²² See Donna R. Christie, *Living Marine Resources Management: A Proposal for Integration of United States Management Regimes* [hereinafter *Proposal for Integration*], 34 ENVTL. L. 107, 111-12 (2004).

foreign vessels' activities.²³ This lack of progress prompted Congress in 1976 to propose the Fishery Conservation and Management Act, more commonly known as the Magnuson-Stevens Act.²⁴

The 1976 Magnuson-Stevens Act expanded the federal fishing waters from between a range of three miles to a range of two hundred miles from shore.²⁵ The purpose was to authorize federal regulation of the waters within the 200 mile zone.²⁶ The 1976 Magnuson-Stevens Act originally labeled this zone as a fishery conservation zone but was amended in 1983 to better describe the American jurisdiction over the 200 mile zone by labeling it as an exclusive economic zone ("EEZ") and established the jurisdiction of fishery councils.²⁷ Before the establishment of EEZ's, the ocean was essentially a "free-for-all" with both domestic and foreign vessels attempting to catch as many fish as possible.²⁸

Within the Act was the power to establish Fishery Management Councils ("FMC") to oversee all fisheries under its geographical jurisdiction.²⁹ Once a fishery management plan is determined, the Secretary of Commerce empowers the National Marine Fishery Service ("NMFS") and/or the National Ocean and Atmospheric Administration ("NOAA") to determine if the plan complies with the Magnuson-Stevens Act 1976; it is then approved or disapproved by the Commerce Secretary of Commerce.³⁰

In accordance with the 1976 Magnuson-Stevens Act power to create FMC's, in 1976 the New England Fishery Management Council

²³ See *id.* at 112 (regulation attempted through both treaties and regional fisheries organizations to address depleted fish stocks to little effect).

²⁴ *Id.* at 113 (codified as Magnuson-Stevens Fisheries Conservation and Management Act, *supra* note 15).

²⁵ Bryant E. Gardner, *Window on Washington: Fishing for Change*, 10 BENEDICT'S MARITIME BULL. 4 (2012).

²⁶ Jay M. Zitter, *Validity, Construction, and Application of Magnuson Fishery Conservation and Management Act Provision Providing for National Standards for Fishery Conservation and Management* (16 U.S.C.A. § 1851), 30 A.L.R. FED. 2D 411, §2 (2008).

²⁷ Christie, *supra* note 22, at 113.

²⁸ *Id.* at 159.

²⁹ See Zitter, *supra* note 26, at §2.

³⁰ *Id.*

(“New England FMC”) was created.³¹ As one of eight FMC’s created in the U.S., the role of the New England FMC was the conservation and management of the fishery resources from a range of 3 to 200 miles off the coast of the New England states bordering the Atlantic Ocean (Maine, New Hampshire, Massachusetts, Rhode Island and Connecticut).³² To some extent, its current power overlaps with that of the Mid-Atlantic FMC for certain species.³³ The New England FMC is currently governed by multiple groups.³⁴

The New England Fishery Management Council (“New England FMC”) was created in 1977 in response to the FMC power in the 1976 Magnuson-Stevens Act to manage the cod, haddock and yellowtail flounder stocks.³⁵ The New England FMC utilized a quota system and trip limits in order to help these stocks in particular, resulting in a partial recovery of these stocks.³⁶ These limitations ceased operating in 1982 after a series of issues came to light, notably among them the regional fishermen not adhering to the trip limits and the general sense that enforcement of the trip limits was too difficult to maintain.³⁷

Without any enforcement on fishing limits or the participants in the fishery after 1982, local fishing took a drastic downturn, seeing increases in the amount of fish being caught and, as a result, the number of fish beginning to dwindle.³⁸ The fisheries were not only hampered by the 1976 Magnuson-Stevens Act but international politics played a role as well.³⁹ The direct result of this was the stark

³¹ *About NEFMC*, NEW ENG. FISHERY MGMT. COUNCIL, <http://www.nefmc.org/about> [<https://perma.cc/WN94-U38S>] (last visited Nov. 1, 2015).

³² *Id.*

³³ *Id.* (The two councils oversee the spiny dogfish and the monkfish.); *see About the Council*, MID-ATLANTIC FISHERY MGMT. COUNCIL, <http://www.mafmc.org/about/> [<https://perma.cc/K9MY-KCU9>] (last visited Dec. 26, 2015).

³⁴ *See About NEFMC*, *supra* note 31.

³⁵ Shelley, *supra* note 2, at 225.

³⁶ *Id.*

³⁷ *Id.* at 225-26.

³⁸ *See also id.* at 226 (without control on fishing power or number of participants in the fishery, both areas saw increases which impacted fishing mortality).

³⁹ *Id.* (International Court of Justice reestablishes boundary between United States and Canada which gave Canada a larger portion of Georges Bank, a popular and traditional area for fishing by Maine and Massachusetts boats).

realization that overfishing was an issue and it was an issue that the NMFS could have forced FMC's to deal with properly.⁴⁰ However, the 1976 Magnuson-Stevens Act did not include provisions describing the actions NMFS could take in response to an FMC that failed in dealing with overfishing.⁴¹ NMFS initially intended to change the New England fisheries plan due to weak conservation regulations.⁴² However, they would ultimately retreat from this stance under pressure from a delegation of New England Congressional power.⁴³ These incidents imply that the NMFS simply lacked the political power to act despite what it actually desired.⁴⁴

The 1976 Magnuson-Stevens Act also established the seven National Standards for fishery management which all fishery management plans must conform to: 1) take conservation and management measures to prevent overfishing while maintaining an optimum yield; 2) using the best scientific information for conservation and management measures; 3) fish stocks are to be managed as a unit; 4) there will no discrimination between the states for conservation and management measures; 5) efficiency will be promoted in using fishery resources except economic allocation will never be considered; 6) conservation and management measures will take into account variations among fisheries; and 7) conservation and management measures shall minimize costs.⁴⁵ While the Secretary of Commerce retains the power to approve fishery management plans, any plan that is in violation of any National Standard may not be recommended for approval.⁴⁶

Despite having seven individual national standards, National Standard 1⁴⁷ has been a source of concern for the fishing industry and New England in particular.⁴⁸ This is designed to produce sustainable

⁴⁰ See Dana, *supra* note 9, at 842-43.

⁴¹ *Id.*

⁴² *Id.*; accord Shelley, *supra* note 2, at 227.

⁴³ Dana, *supra* note 9, at 843; accord Shelley, *supra* note 2, at 227.

⁴⁴ Dana, *supra* note 9, at 843.

⁴⁵ See 16 U.S.C. § 1851 (2007).

⁴⁶ Zitter, *supra* note 26, at §2.

⁴⁷ 16 U.S.C. § 1851(a)(1) (2007) ("Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.").

⁴⁸ See Magnuson-Stevens Revisited, *supra* note 10, at 24.

fisheries but the “optimum yield”⁴⁹ wording has presented a conundrum; namely, how do you fish to the optimum yield to achieve the greatest benefit while also limiting overfishing?⁵⁰ This conflict between desired economic outcome and sustainable fisheries has caused some critics, namely conservation groups, to refer to New England as a disaster in management.⁵¹ However, still others, namely fishermen, have stated that the act was generally a success in conservation and achieved its goal of making the oceans “American” by largely eliminating foreign fishing.⁵²

In response to this confusion, the NMFS made revisions in 1989 to the guidelines for fishery management plans under Section 301(b) of the 1976 Magnuson-Stevens Act.⁵³ This allowed for the fisheries to be provided with the NMFS interpretation of the national standards with the purpose of providing guidance.⁵⁴ These revisions forced FMC’s to have their own definitions of overfishing and have proper recovery plans in place in the event of overfished stock.⁵⁵ It was soon realized by Congress that a more sustainable fishery could allow for a greater harvest.⁵⁶

B. Sustainable Fisheries Act

Issues such as this led to the passage of the Sustainable Fisheries Act⁵⁷ (“SFA”) in 1996 as an amendment to the 1976 Magnuson-Stevens Act.⁵⁸ The reason for its passage differs greatly based on whom you ask; some say that this was necessitated by a lack of any real change over the twenty years since 1976 Magnuson-Stevens Act

⁴⁹ See Christie, *supra* note 22, at 114 (defining optimum yield as “the amount of fish providing the greatest overall benefit to the Nation”).

⁵⁰ *Id.* at 113-14.

⁵¹ See Shelley, *supra* note 2, at 222 (“New England has become a metaphor for management failure.”).

⁵² E. Michael Linscheid, *Living to Fish, Fishing to Live: The Fishery Conservation and Management Act and Its Implications for Fishing-Dependent Communities*, 36 U.S.F.L. Rev. 181, 185 (2001).

⁵³ Shelley, *supra* note 2, at 227.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Linscheid, *supra* note 52, at 185.

⁵⁷ 16 U.S.C. § 1801 (2007).

⁵⁸ Christie, *supra* note 22, at 114.

had been enacted⁵⁹ as well as a need to protect the fisheries better⁶⁰ whereas others would say that it was needed to create a better long-term plan for more stable and substantial harvests.⁶¹ Three new national standards were adopted in addition to the original seven, including one standard that was intended to consider fishing communities when attempting to create sustainable fisheries as well as to minimize the economic impact.⁶² This would seem to be a large factor in the idea behind the balancing act of H.R. 1335 between environmental concerns and economic needs. The main purpose of the SFA was, ultimately, to avoid another tragedy of the commons via overfishing.⁶³

New England had experienced a tragedy of the commons with cod by this point in time.⁶⁴ The sudden increase of cod landings followed by a sudden decrease in cod landings resulted in United States cod landings being less than half in 2003 than what they were in 1950 and only a fifth of the landings in the peak year of 1980.⁶⁵ This was a result of, among other things, an increase in fishermen as a result of human demand and an increase in fisheries in general.⁶⁶ Perhaps most importantly, domestic fishermen felt that they had a greater right to these fish than ever before with the exclusion of international fishermen from the 1976 Magnuson-Stevens Act.⁶⁷

Tragedy of the commons was seen as a pattern developing in U.S. fisheries.⁶⁸ Fishermen were lured by the promise of large harvests as they learned of the large number of fish available in a region such as New England.⁶⁹ Gradually, large boats would replace small boats and

⁵⁹ *Id.*

⁶⁰ *See* Gardner, *supra* note 25.

⁶¹ Linscheid, *supra* note 52, at 185.

⁶² 16 U.S.C. § 1851(a)(8) (2007); *see* Linscheid, *supra* note 52, at 185.

⁶³ Linscheid, *supra* note 52, at 186.

⁶⁴ *See* Andre Verani, *Community-Based Management of Atlantic Cod by the Georges Bank Hook Sector: Is It a Model Fishery?*, 20 TUL. ENVTL. L.J. 359, 362 (2007) (70 million pounds of cod were landed in 1977, rising to a high of 180 million pounds in 1980. This would drop to 96 million pounds in 1990, 30 million pounds in 1995, and finally 24 million pounds by 2003.).

⁶⁵ *Id.*

⁶⁶ *Id.* at 363.

⁶⁷ *Id.* at 362.

⁶⁸ Linscheid, *supra* note 52, at 186.

⁶⁹ *Id.*

the fishery would begin to be depleted as its capacity was outpaced by the harvesting capacity.⁷⁰ To combat this, the SFA intended to both increase conservation efforts across the industry and rebuild the depleted fisheries.⁷¹ It would require FMP to specify their criteria for reasoning that a fishery had been overfished and introduce measures to rebuild an overfished fishery.⁷² The Secretary of Commerce was held accountable for this by requiring an annual report made to Congress on the fishery status and to identify currently overfished fisheries or fisheries approaching the status of being overfished.⁷³ This would put the burden on the FMC to draft a plan within the year to more effectively stop overfishing and rebuild the fishery.⁷⁴ If this was not done, then the Secretary would have the power to step in and act.⁷⁵ The intent of the SFA was to use updated science to have the best possible conservation and management programs in eliminating overfishing.⁷⁶

The result of the SFA would appear to be mixed. The SFA prompted the fishing industry to examine the impact of their fishing operation on non-target species and the environment more closely.⁷⁷ It would also delve into the public policy of what effect management measures had on people, their communities and their safety.⁷⁸ While it was an uphill struggle, the SFA did manage to, among other achievements, develop rebuilding plans for nearly all overfished stocks and take bycatch⁷⁹ into consideration for the management of fisheries.⁸⁰

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 187.

⁷³ 16 U.S.C. § 1854(e)(1) (2007); *see* Linscheid, *supra* note 52, at 187.

⁷⁴ Linscheid, *supra* note 52, at 187.

⁷⁵ *Id.*

⁷⁶ 16 U.S.C. § 1801(c)(3) (2007).

⁷⁷ *Testimony of the Assistant Administrator for Fisheries Dr. William Hogarth on Reauthorization of the Magnuson-Stevens Act and the National Environmental Policy Act Before the House Resources Fisheries and Oceans Subcommittee, UNITED STATES DEPARTMENT OF COMMERCE (April 14, 2005) [hereinafter Testimony on Reauthorization of Magnuson-Stevens Act].*

⁷⁸ *See id.*

⁷⁹ *See generally* Marian MacPherson, *Integrating Ecosystem Management Approaches into Federal Fishery Management Through the Magnuson-Stevens Fishery Conservation and Management Act*, 6 OCEAN & COASTAL L. J. 1, 15

Once again, however, the view of the different stakeholders were split on this new iteration, prompting litigation to be filed in 2001 and 2005 over the failure of New England FMC to adhere to the new standards laid out in the SFA.⁸¹ Obviously, the conflict between fisheries and the federal acts continued as a balance was still being sought. While NOAA has stated that the SFA was successful, with some species being removed from the overfished list in the early 2000's,⁸² it cannot be ignored that other species have been added to the overfished list.⁸³ Species that were introduced as overfished include the windowpane flounder in the northeast as well as the Pacific whiting and yelloweye rockfish in the northwest.⁸⁴ The SFA was intended to correct the weaknesses of the 1976 Magnuson-Stevens Act and did achieve this for the most part;⁸⁵ however, conservationists and fishermen continued to struggle in developing a plan that worked for both sides.⁸⁶

C. Reauthorization of Magnuson-Stevens Fishery Conservation and Management Act

In response to the SFA, yet another change was made to the fishing industry in 2006: the Magnuson-Stevens Reauthorization Act ("2006

(2001) (Bycatch is defined as "fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards [but] does not include fish released alive under a recreational catch and release program.").

⁸⁰ Testimony on Reauthorization of Magnuson-Stevens Act, *supra* note 77.

⁸¹ *See generally* Conservation Law Found. v. Evans, 209 F. Supp. 2d 1 (D.D.C. 2001); *see generally* Oceana, Inc. v. Evans, No. 04-0811, 2005, U.S. DIST. LEXIS 3959 (D.D.C. Mar. 9, 2005).

⁸² *See* Christie, *supra* note 22, at 120 ("[T]wenty species have been taken off the overfished list and overfishing has been eliminated for twenty-five species.").

⁸³ *See id.* at 120 (Fourteen species of groundfish have been added to list of overfished species and thirteen other species have become overfished). NOAA maintains that these statistics are a good indicator of stock status and these numbers can change on a year to year basis.

⁸⁴ *NOAA Fisheries 2002 Report to Congress*, NOAA, V (April 2003) available at <http://www.nmfs.noaa.gov/sfa/statusoffisheries/Archives/StatusoffFisheriesReportCongress2002.pdf> [<https://perma.cc/97NP-LFZV>].

⁸⁵ *See* Linscheid, *supra* note 52, at 188.

⁸⁶ *See* Christie, *supra* note 22, at 121.

Magnuson-Stevens Reauthorization”).⁸⁷ The 2006 Magnuson-Stevens Reauthorization strengthened the conservation objectives of the SFA.⁸⁸ It also increased the social and economic inquiry of National Standard 8 by stating that the economic and social data used must meet the requirement of National Standard 2, which means that it must fall within the best science available.⁸⁹ The Act also meant that the social and economic impacts of conservation and management measures would be more heavily weighted in making decisions.⁹⁰ Fisheries were given until 2011 to create a new way to develop regulations for stocks that were subject to overfishing.⁹¹ The science improved upon that in the SFA by creating a requirement that all FMC’s would be required to have a science and statistical committee (“SSC”) and decreasing the power of an FMC to ignore or amend the counsel given from these committees.⁹² The New England SSC provides the New England FMC with up-to-date scientific advice to assist with fishery management decisions.⁹³

Among many changes were the introduction of accountability measures that were established for catch limits and an improved focus on the science of the fisheries.⁹⁴ While those in the fishing industry were pleased with the progress of annual catch limits, conservation groups were once again unhappy.⁹⁵ Despite the head of the NMFS stating that they were making tremendous progress with these new provisions in ending overfishing and rebuilding stocks,⁹⁶ this would

⁸⁷ *Magnuson-Stevens Revisited*, *supra* note 10, at 28; Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, PUB. L. NO. 109-479, 120 STAT. 3575.

⁸⁸ Shaun M. Gehan, et al., *Battle to Determine the Meaning of the Magnuson-Stevens Fisheries Conservation and Management Reauthorization Act of 2006: A Survey of Recent Judicial Decisions*, 18 OCEAN & COASTAL L.J. 1, 2, 5 (2012).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Aileen M. Hooks, et al., *Recent Developments: Natural Resources: Fishery Conservation and Management After Reauthorization of MSA*, 39 TEX. ENVTL. L. J. 193, 194 (2009).

⁹² *Magnuson-Stevens Revisited*, *supra* note 10, at 29.

⁹³ NEW ENG. FISHERY MGMT. COUNCIL, *supra* note 31.

⁹⁴ *Id.*

⁹⁵ Gehan, *supra* note 88, at 3.

⁹⁶ *Id.*

result in even further litigation over the right to police the seas and all that dwells within it.⁹⁷

The changes made in the 2006 Magnuson-Stevens Reauthorization had a direct effect on the New England FMC.⁹⁸ Annual catch limits were established for all managed stocks and these carried with them fairly strict accountability measures to make sure that the limit was not breached.⁹⁹ These limits were set by the SSC in a way that could not be challenged by the New England FMC and this was further strengthened by a later amendment to National Standard 1, which stated that the catch was to be reduced by the scientific and management uncertainties that were current in the fishery.¹⁰⁰

While the 2006 Magnuson-Stevens Reauthorization was still pending in Congress, the New England FMC was making a good faith effort to develop plans to amend its own fishery management plan ("FMP").¹⁰¹ The process of adding Amendment 16 began on November 6, 2006 and was planned to be an important amendment that would significantly change the management for the fishery.¹⁰² This amendment was intended to be in place by May 1, 2009, the beginning of the 2009 fishing season for most stocks.¹⁰³ It would change the catch limits in order to keep the stocks on the proper rebuilding scale with an intention of having most of the stocks rebuilt by 2014.¹⁰⁴ In addition to this, a hard quota¹⁰⁵ system would be established for improved groundfish management and the New England FMC would also look into different management systems for the fishery.¹⁰⁶ Based upon feedback from the community, three management plans were agreed upon as potential alternatives.¹⁰⁷

⁹⁷ *Id.*

⁹⁸ *See Magnuson-Stevens Revisited*, *supra* note 10, at 29-30.

⁹⁹ *Id.* at 29.

¹⁰⁰ *See* 50 CFR § 600.310(g)(2) (2009); Shelley, *supra* note 10, at 30.

¹⁰¹ *Magnuson-Stevens Revisited*, *supra* note 10, at 37.

¹⁰² *Id.*

¹⁰³ *Id.* at 38.

¹⁰⁴ *Id.* at 37.

¹⁰⁵ *See id.* at 37, n.87 (A hard quota system "is a direct control system where the main conservation mechanism is the setting of a total amount of fish to be caught, after which the fishery closes.").

¹⁰⁶ *Id.* at 38.

¹⁰⁷ *Id.* at 38-39.

These plans were ultimately prohibited by the implementation of the 2006 Magnuson-Stevens Reauthorization.¹⁰⁸ The New England FMC Amendment 16 was in conflict with the new language regarding annual catch limits, accountability measures and other provisions.¹⁰⁹ Amendment 16 also ran into trouble with the new scientific approach that was introduced with the reauthorization, in particular the peer review assessment of groundfish stocks known as the Groundfish Assessment Review Meeting (“GARM”).¹¹⁰ GARM changed how the fishery scientists would look at fish data in such ways as changing the mortality rates of species.¹¹¹ To make matters worse, the new SSC assigned to the New England FMC rejected Amendment 16’s approach towards allowable catches and annual catch limits as being both too complicated and inaccurate.¹¹² The SSC instituted a new approach based upon the new regulations and current literature on scientific uncertainty.¹¹³ The New England FMC had to follow the advice of the SSC because of the language of the 2006 Magnuson-Stevens Reauthorization and now had to begin anew on amending its provisions.¹¹⁴

During the new Amendment 16 process, problems were quickly discovered that would result in drastic changes being required.¹¹⁵ Under the current days-at-sea¹¹⁶ program, fishermen faced the harsh realization that they would only have a few days a year to actually catch groundfish in accordance with the newly imposed annual catch limits; this draconian reduction in days-at-sea would have been disastrous for the region.¹¹⁷ The New England FMC was forced to push back its deadline for implementing the amendment to May 1,

¹⁰⁸ *See id.* at 39.

¹⁰⁹ *Id.* at 39-40.

¹¹⁰ *Id.* at 40.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 40-41.

¹¹⁶ *See id.* at 38 n.91 (A days-at-sea program has no hard catch limits, just annual catch targets, and limits this by such ways as limiting the number of days fished.).

¹¹⁷ *Id.* at 41.

2010 and finally did complete it in late 2009 with a large rewrite of their groundfish management.¹¹⁸

Amendment 16 went into effect shortly before the beginning of the 2010 fishing season and opposition continued as aggrieved fishermen began new litigation.¹¹⁹ These cases tended to argue that Amendment 16 was in violation of the 2006 Magnuson-Stevens Reauthorization with overly restrictive catch limits and a failure to properly represent New England fishermen as well as violating the National Standards.¹²⁰

Debate continued to rage when a federal fishing disaster was declared in the Northeast on September 13, 2012 for the 2013 fishing season.¹²¹ In a fishing disaster, Congress makes federal funds available to the affected regions and NOAA works with Congress to develop a plan to properly assist the affected communities.¹²² This was due to the slow rebuilding of fish stocks that had affected the way of life for local fishermen.¹²³ For example, the Gulf of Maine was reported to have its cod stocks sitting at roughly 20 percent of its rebuilding target, a critically low amount.¹²⁴

Despite the fishermen in the region obeying the new laws on catch limits, the fish stocks were still negatively affected and so was the fishing industry.¹²⁵ This is evidenced in the account of fisherman John Orr (“Orr”), who managed to catch only 500 of the 180,000 pounds of

¹¹⁸ *Id.* at 41-42.

¹¹⁹ *Id.* at 43; *see Lovgren v. Locke*, 701 F.3d 5 (1st Cir. 2012); *see City of New Bedford v. Locke*, 2011 U.S. DIST. LEXIS 70895 (D. Mass. June 30, 2011). In both cases, the plaintiffs could not overcome Motions for Summary Judgment, finding that there was no violation of the statute.

¹²⁰ *Magnuson-Stevens Revisited*, *supra* note 10, at 46-47.

¹²¹ *Secretary of Commerce Declares Disaster in Northeast Groundfish Fishery*, NOAA (Sept. 13, 2012), http://www.nmfs.noaa.gov/mediacenter/2012/09/13_secretary_of_commerce_declares_disaster_in_northeast_groundfish_fishery.html [<https://perma.cc/UD62-HNAX>].

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Jess Bidgood, *U.S. Declares a Disaster for Fishery in Northeast*, N.Y. TIMES (Sept. 13, 2012), http://www.nytimes.com/2012/09/14/us/commerce-dept-declares-northeast-fishery-a-disaster.html?_r=1 [<https://perma.cc/DHT4-9SDC>].

¹²⁵ *Secretary of Commerce Declares Disaster in Northeast Groundfish Fishery*, *supra* note 121.

cod that he was allotted in 2012.¹²⁶ Orr had to begin landing dogfish instead of cod due to the poor numbers.¹²⁷ This transfer of effort from codfish to dogfish is harmful to both the fisherman and the New England region, as dogfish is not a profitable item for American consumers since it is a relatively new addition to menus in the region and America itself.¹²⁸ The Food and Drug Administration (“FDA”) has actually approved a marketing campaign to make dogfish more palatable to Americans by changing the name of the spiny dogfish to “cape shark” as part of an focused marketing attempt to make unknown species acceptable on menus.¹²⁹ For some fish, such as the Acadian redfish, this has been a profitable endeavor but it remains an uphill battle for the newly dubbed cape shark, as it has cost a comparatively small \$.20 a pound for the past seven years.¹³⁰ New England is further damaged by this because the majority of cape shark caught in New England waters actually go to kitchens in Great Britain, where it is a popular alternative for fish and chips, depriving New England of additional revenue by not selling to local restaurants or wholesale outlets.¹³¹

The New England FMC held a meeting in New Hampshire in January 2013 regarding the limits to codfish fishing.¹³² With a vigorously objecting community and fishermen in attendance, a reduction of 77% in the yearly harvest of cod over the following three years was proposed as well as a 61% reduction in the harvest of cod from Georges Bank in 2014.¹³³ These measures were both accepted in May of 2013 by NOAA.¹³⁴ Local fishermen were understandably

¹²⁶ See Bidgood, *supra* note 124 (declaring that “[t]his year has been the worst I’ve ever seen it. . . I just don’t see any fish being landed”).

¹²⁷ *Id.*

¹²⁸ Ray Carbone, *Spiny Dogfish Gets a Marketing Makeover*, BOS. GLOBE (October 27, 2015) <https://www.bostonglobe.com/business/2015/10/27/seafood-groups-aim-expand-new-england-culinary-tastes/4bNZTYAL4AXqbgPmppJjhK/story.html> [https://perma.cc/7WW5-5Y7K].

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Adler, *supra* note 11, at 150-51.

¹³³ *Id.* at 151.

¹³⁴ *Id.*

unhappy with this development.¹³⁵ Acknowledging the effect that this would have on the local fishing industry, a NOAA administrator felt that there were few options available to them in terms of measures that could be taken.¹³⁶

III. THE INTRODUCTION OF BILL H.R. 1335-STRENGTHENING FISHING COMMUNITIES AND INCREASING FLEXIBILITY IN FISHERIES MANAGEMENT ACT

H.R. 1335 began development in 2011 as a means of reauthorizing the 2006 Magnuson-Stevens Reauthorization.¹³⁷ Its intention from the very start has been to balance conservation measures with the economic use of the resources.¹³⁸ H.R. 1335 was intent on doing this as a result of the NMFS determining that overfishing had effectively ended in America.¹³⁹ As a result of this progress, H.R. 1335 passed the House of Representatives in June 2015.¹⁴⁰ The bills contained numerous components which were introduced as changing the way stocks are managed including the elimination of the current 10-year limit on rebuilding fish stocks, changing the catch limit requirements for select species and allow the chance for economic hardship exemptions to select conservation measures.¹⁴¹ It was written expressly with fishermen in mind: H.R. 1335 intends to keep coastal economies viable while maintaining the idea of conservation of the

¹³⁵ See *id.* (One fisherman stated, “Right now what we’ve got is a plan that guarantees the fishermen’s extinction and does nothing to ameliorate it.”).

¹³⁶ See *id.* (Regional administrator of NOAA, John Bullard, stated, “It’s midnight and getting darker when it comes to how many cod there are. There isn’t enough cod for people to make a decent living.”).

¹³⁷ *Second Hearing on H.R. 1335, supra* note 4, at 3592 (statement of Rep. Young).

¹³⁸ *Id.*

¹³⁹ *Id.*; see also *Status of Stocks 2014: Annual Report to Congress on the Status of U.S. Fisheries*, NAT’L OCEANIC & ATMOSPHERIC ADMIN. (April 2015), http://www.nmfs.noaa.gov/sfa/fisheries_eco/status_of_fisheries/archive/2014/2014_status_of_stocks_final_web.pdf [https://perma.cc/8XGM-39EF] (The number of stocks subject to overfishing or listed as overfished are at an all-time low. 37 stocks have been rebuilt since 2011 and no new species have been added to the overfished list, which is a significant development.).

¹⁴⁰ Emily Yehle, *Bill Boosting Flexibility for Rebuilding Fish Stocks Passes House Amid Controversy*, ENV’T AND ENERGY DAILY (June 2, 2015).

¹⁴¹ *Id.*

fisheries.¹⁴² While H.R. 1335 does have its share of detractors,¹⁴³ the bill has the support of multiple conservation groups as well as recreational fishing groups, as it would aid both commercial and recreational fishermen.¹⁴⁴

One of the focuses of H.R. 1335 is the desire to bring domestic seafood back to American tables.¹⁴⁵ Currently, 90% of seafood eaten in America is imported when there is an abundance of fish in the local ocean waters.¹⁴⁶ This reauthorization would supply fishermen with updated practices and science to provide more domestic fish.¹⁴⁷ H.R. 1335 would also make reforms that allow for greater public involvement with the development of science used in management decisions and provide for regions to have a greater say in decisions that impacted their stakeholders.¹⁴⁸ This allows flexibility for different regions to approach similar situations in different ways based upon their needs rather than forcing one particular way upon fisheries and the industry in general.

One of the key components to this bill was introduced and supported by the representatives of Massachusetts which would give FMC's the necessary funding to take on the reporting requirements of

¹⁴² See also *Second Hearing on H.R. 1335*, *supra* note 4, at 3592 (statement of Rep. Young) (The bill is written for fish and communities, not for special interest groups who only wish to protect their specialized ideas. If special interest groups are allowed to influence a bill such as this, when the fishing industry provides as much as \$141 billion to the American economy as well as approximately 1.3 million jobs, then we would be damaging the chance for America to continue their proud and productive heritage in fishing.); see generally *Second Hearing on H.R. 1335*, *supra* note 4, at 3592 (statement of Rep. Wittman).

¹⁴³ Letter to Representative (May 27, 2015), <http://democrats-naturalresources.house.gov/imo/media/doc/NGO%20Community%20Letter%20May%202027.pdf> [<https://perma.cc/64LX-WZUP>] (Those in opposition to H.R. 1335 include the World Wildlife Fund and Conservation Law Foundation.).

¹⁴⁴ *Second Hearing on H.R. 1335*, *supra* note 4, at 3592 (statement of Rep. Wittman) (Support for this includes the Congressional Sportsmen's Foundation and the Center for Coastal Conservation.).

¹⁴⁵ H.R. 1335- "The Strengthening Fishing Communities and Increasing Flexibility in Fisheries Mgmt. Act" (*Magnuson-Stevens Reauthorization*), HOUSE COMM. ON NAT. RESOURCES, <http://naturalresources.house.gov/uploadedfiles/1335-onepager.pdf> [<https://perma.cc/RVB2-XTAM>].

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

the bill.¹⁴⁹ The amendment would help the coastal businesses, the fishing community and fishermen themselves by ensuring that money from NOAA's asset forfeiture fund would go towards improving the science involved in sustainable fishery management practices.¹⁵⁰

IV. SOLUTION

The fishing industry needs support from legislators in order to get back to a point where it is an economically viable industry. However, this can only be accomplished by remaining cognizant of environmental concerns as well as economic concerns. H.R. 1335 offers the best of both worlds and should be enacted. It will offer the necessary funding for FMC's to tackle the proper reporting requirements and it will also provide funding to bear the cost of at-sea and shore-side monitoring, which in previous iterations was simply putting too much of a financial burden upon the fishermen.¹⁵¹ In addition to these environmental concerns, it will provide financial relief for fishermen—and, as a result, the surrounding communities—by providing for a more flexible approach to rebuilding the fish stocks.¹⁵² This will allow for a less rigid approach to maintenance of the fisheries, since there will no longer be a mandatory ten year rebuilding period; this will be replaced with the more reasonable approach of using data that indicates how long a fishery needs to rebuild rather than a set amount of years.¹⁵³ In short, to paraphrase

¹⁴⁹ *Second Hearing on H.R. 1335, supra* note 4, at 3592 (statement of Rep. Keating) (This amendment would do five things: 1) It would broaden the use of forfeiture funds for research, particularly important in the Northeast where timely information can make a significant difference; 2) Fishermen would no longer have to pay for at-sea monitoring; 3) Fishermen can update their gear to avoid unnecessary bycatch and protect other species; 4) Fisheries will have additional research for when they make impact statements as required under the bill, thus providing them with adequate resources for these statements; and 5) Funds would go towards rebuilding/maintaining fisheries and ensuring healthy ecosystems.).

¹⁵⁰ *Id.* (statement of Rep. Moulton).

¹⁵¹ *Second Hearing on H.R. 1335, supra* note 4, at 3592 (statement of Rep. Lynch).

¹⁵² H.R. 1335, *supra* note 14, § 4.

¹⁵³ *See id.*

Alaskan representative Don Young, H.R. 1335 will provide help for the fish themselves, the coastal communities and the nation itself.¹⁵⁴

In addition to support at the federal level, the Attorney General of Massachusetts, Maura Healey (“Healey”), has thrown her support behind H.R. 1335 in a letter to the Senate.¹⁵⁵ The letter states that her office desires a balanced approach to fisheries management that will continue to work towards species conservation and the survival of the fisheries.¹⁵⁶ In December 2014, Healey’s office commented on the upcoming reauthorization of the Magnuson-Stevens Act in an effort to have the law serve the fishing industry more effectively locally as well as nationally by protecting both fish species and their ecosystems.¹⁵⁷ This is very similar to the idea of a balancing act offered in H.R. 1335.¹⁵⁸ These comments were made in response to the declared fishing disaster, which cut catch allowances by a staggering 77% for certain important groundfish and lowered them even further in 2014.¹⁵⁹ This was after a 2012 season that saw the New England fishing industry produce \$8.5 billion in sales and \$2.2 billion in Massachusetts income.¹⁶⁰ By accepting H.R. 1335, Massachusetts fishermen and the nation’s fishermen would benefit.¹⁶¹

Healey also argued in support of the improved science proposed in H.R. 1335.¹⁶² Using data from the National Academy of Sciences, Healey stated that there is deviation within the prior act’s rule for taking ten years to rebuild a stock.¹⁶³ This lends further credence to

¹⁵⁴ *Press Release: U.S. House Passes Magnuson-Stevens Reauthorization with Bipartisan Support*, HOUSE COMM. ON NAT. RESOURCES (June 1, 2015), <http://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=398689> [<https://perma.cc/EC99-7TN4>].

¹⁵⁵ Letter from the Attorney General of Mass., Maura Healey, to the U.S. Senate Comm. on Com., Sci. & Transp. (June 4, 2015), <http://www.mass.gov/ago/docs/press/2015/msa-letter.pdf> [<https://perma.cc/98E2-WVEB>] [hereinafter Healey Letter].

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *See generally Second Hearing on H.R. 1335*, *supra* note 4.

¹⁵⁹ Healey Letter, *supra* note 155.

¹⁶⁰ *Id.*

¹⁶¹ *See id.*

¹⁶² *Id.*

¹⁶³ *Id.*; *see Evaluating the Effectiveness of Stock Rebuilding Plans of the United States*, COMM. ON EVALUATING THE EFFECTIVENESS OF STOCK REBUILDING

H.R. 1335 adopting a more flexible approach to the rebuilding of the fisheries. By allowing the methods to change year to year, updated science can be utilized and thus better methods are used in the end. The science that is used to oversee fisheries should not leave the fisheries in fear of another drastic setback; rather, there should be greater level of predictability in stock assessments and a lower margin of error.¹⁶⁴

The science involved in H.R. 1335 would be flexible; indeed, the flexibility of the bill itself is based on science.¹⁶⁵ Fish stock rebuilding would be based upon the biology of the fish and harvest levels would not interfere with levels of overfishing.¹⁶⁶ While regional councils will be free to make their own decisions, they will continue to follow the recommendations of their SSC's.¹⁶⁷ H.R. 1335 would allow for flexibility in recognizing different ocean conditions, different modes of harvesting, regional fishery variations and local community impacts, thus allowing for a more flexible and evolving science instead of a rigid scientific approach that would not change until the next reauthorization.¹⁶⁸

Naturally, there have been opinions on both sides of this issue. Perhaps the most vocal critic of H.R. 1335 has been the Executive Branch, who issued a letter that stated the bill would undermine the use of science in sustaining the fishing industry and that the current bill was working fine.¹⁶⁹ President Obama is promising to veto H.R. 1335 if it reaches the point where it is presented to him.¹⁷⁰ This threat

PLANS OF THE 2008 FISHERY CONSERVATION AND MGMT. REAUTHORIZATION ACT, 1, 123 (2014) (Due to the relative uncertainty in fish stock assessment, the status of a stock can change from year to year as more data becomes available and assessment methods evolve over time.).

¹⁶⁴ Healey Letter, *supra* note 155.

¹⁶⁵ *Second Hearing on H.R. 1335*, *supra* note 4, at 3592 (statement of Rep. Young).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Executive Office of the President, *Statement of Admin. Policy: H.R. 1335-Strengthening Fishing Communities and Increasing Flexibility in Fisheries Mgmt. Act* (May 19, 2015), https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr1335r_20150519.pdf [<https://perma.cc/D9NE-28DE>] (offered in opposition to H.R. 1335-Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act).

¹⁷⁰ *Id.*

is potentially a huge roadblock for this bill since a veto override would be necessary if the bill is vetoed by the President. However, many believe that this bill is not placing politics over science as the President is asserting;¹⁷¹ rather, as one fisherman puts it, it is an attempt to explore the reasons behind the fishing disaster of 2012 and offers remedies on how to fix it.¹⁷² There were concerns over the science previously being used for the annual catch limits.¹⁷³ One of these is the sample sizes being taken during assessments from too few places and, as a result, were too small to portray accurately the number of fish stock.¹⁷⁴ Critics have included Massachusetts then Governor-elect, Charlie Baker (“Baker”), who said that there was not enough being done to support the region’s fishermen and questioned the research being done to impose further restrictions on the cod stocks.¹⁷⁵ Baker held a closed-doors meeting in November 2014 with fishermen in response to the Gulf of Maine being shut down for cod fishing by NOAA in an attempt to protect the species.¹⁷⁶ Fishermen disputed the numbers from the federal government, stating that the government focused on a scant 75 mile investigation of a total 65,000-square-mile area.¹⁷⁷ This lends credence to the desire for a change in the science being used to regulate the fisheries as well as the need for more flexibility in the rebuilding of fish stocks.

The need for change is epitomized by the statement of fisherman Al Cottone, who exposed some of the hypocrisy surrounding an area of the Gulf of Maine that was shut down a week later.¹⁷⁸ Cottone

¹⁷¹ *See id.*

¹⁷² Frank Mirarchi, *A Scituate Fisherman’s Perspective on Government’s Fisheries Management*, THE PATRIOT LEDGER (May 28, 2015), <http://www.patriotledger.com/article/20150528/NEWS/150526060> [<https://perma.cc/F4G8-42MS>].

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *See* Laura Crimaldi, *Baker Questions Federal Findings on Fishing Limits*, BOS. GLOBE (Nov. 15, 2014), <https://www.bostonglobe.com/metro/2014/11/15/baker-meets-with-fishermen-about-new-regulations/U6AfkICrBJaj616mrdz8QM/story.html> [<https://perma.cc/PJL8-M6WU>] (Baker said, “I’ve been struck by the dynamic in which the federal government says there are no fish and then fishermen go out and fish for a few hours and catch 10,000 pounds or 5,000 pounds.”).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

caught roughly 1,800 pounds of yellow tail flounder and cod 18 miles offshore and then, seeking to specifically catch flounder, caught 700 pounds of the species a mile and a half closer to port.¹⁷⁹ In this second haul, amongst all of these flounder were a mere two cod; if the fishermen wish to avoid catching cod, then they are able to stay away from them.¹⁸⁰ Therefore, the notion of shutting down an entire region for one species is flawed. Fishermen have learned through experience how to effectively target a specific species if they choose to. It is not simply a matter of dropping the nets into a random part of the ocean and hoping that the resulting catch is something that they can sell; this is a short-sighted view of what fishermen actually do. This notion of “choke species”¹⁸¹ does not allow fishermen to do their jobs in a particular area and are being forced to economically damage themselves by not being able to take in their proper allocation of fish stocks. In the scenario presented by Cottone, fishermen would be costing themselves 700 pounds of a healthy fish stock simply because another stock is depleted. These sorts of actions can lead to a natural distrust of the federal regulators, since they are using the data that fishermen willingly supply to shut down areas to fishing.¹⁸²

It is possible to argue that H.R. 1335 is pursuing another tragedy of the commons. Fishermen seem to be portrayed to the general public as simply wanting to fish the oceans until they are barren. However, it is economical for fishermen to work in conjunction with conservation efforts. As the fish continue to grow, so too will the fishing industry in lifespan. What H.R. 1335 would accomplish is the middle ground that this author believes legislators have been seeking for decades. Fish will remain sustainable and can be blocked from being fished at any

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (Cottone states, “We can stay away from the cod if we want to.”).

¹⁸¹ See *Choke Species Paper*, N. SEA REG’L ADVISORY COUNCIL, (Nov. 24, 2015), [http://www.nsrac.org/category/reports/meetings-c/discards/\[https://perma.cc/MHX6-6XK6\]](http://www.nsrac.org/category/reports/meetings-c/discards/[https://perma.cc/MHX6-6XK6]) (Choke species are defined as “fish species for which quotas are so limited relative to local or general abundance that the imposition of a landing obligation in a mixed fishery is liable to result in fishing vessels having to cease operations well before they have caught their main quota allocations.”).

¹⁸² Crimadi, *supra* note 175 (Fisherman, Tommy Testaverde, states, “They use the information that we give them, catch reports, and close down the areas where we catch the fish.”).

time.¹⁸³ Fishermen will have more flexible catch limits and will no longer have to pay for monitoring, meaning more money in their pocket.

It is only natural that not all fishermen would be in support of H.R. 1335.¹⁸⁴ Fisherman, Greg Walinski, feels that some portions of the bill work and that other portions do not.¹⁸⁵ He believes that it will hurt the healthy fish populations by imposing exemptions and loopholes.¹⁸⁶ He appears to be referencing the proposed Section 5 to H.R. 1335-Modifications to the Annual Catch Limit Requirement.¹⁸⁷ However, it is difficult to view these as actual loopholes that could be exploited; rather, the proposed change would allow for the needs to accommodate any changes to the current ecosystem and also look at the economic needs of the fishing community when setting an annual catch limit.¹⁸⁸ This allows for the fish stocks to be regulated in accordance with current needs and updated science regarding the ecosystem in an effort to keep it modern. While part of the bill does include exemptions, such as there being no annual catch limit for a fish stock that only has a life span of approximately one year, a limit will still be imposed if the fishery is determined to be subject to overfishing.¹⁸⁹ Once again, we encounter the balancing act that H.R. 1335 is providing.

In order to satisfy both the fishing community and those supporting the environmental side, each side has to come to an accord about what should be allowed and what should be prohibited. None of the prior

¹⁸³ See generally Daniel Ovando, *The Oceans Are Not Running Out of Fish*, BREN RESEARCH BLOG (Aug. 3, 2015), <http://brenresearchblog.com/the-oceans-are-not-running-out-of-fish/> [<https://perma.cc/P5HX-UUHU>].

¹⁸⁴ See generally Greg Walinski, *Your View: Not all Fishermen Support Young Bill*, S. COAST TODAY (May 31, 2015, 2:01 AM) <http://www.southcoasttoday.com/article/20150531/OPINION/150539943> [<https://perma.cc/E5C3-J27A>].

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ See H.R. 1335, *supra* note 14, at 5.

¹⁸⁸ See *id.*; see also *Section-by-Section Analysis*, GULF OF MEXICO FISHERY MGMT. COUNCIL, http://gulfcouncil.org/council_meetings/CCC/LegislativeAffairs/Legislation/HR%201335%20Section%20by%20Section.pdf [<https://perma.cc/82QL-H9XG>](last visited Oct. 18, 2015).

¹⁸⁹ See H.R. 1335, *supra* note 14, at § 5.

Magnuson-Stevens bills had attempted this sort of balance before; instead they put a focus on international waters or on maintaining a sustainable level of fish while the fishing industry continued to decline.¹⁹⁰ It is undeniably important to maintain a sustainable level of fish stocks but it is also important to maintain a sustainable fishing industry.

While it remains impossible to please everybody, plenty of conservation groups have thrown their support behind H.R. 1335.¹⁹¹ Indeed, a combined total of 151 organizations, businesses and individuals have penned a letter (“Support Letter”) to Congress in support in the passage of H.R. 1335, including people and entities from all across America as well as 45 individuals from the New England region.¹⁹² The balance between maintaining conservation goals and providing economic relief to coastal communities are a large part of why they support it.¹⁹³

While this bill is seen as hazardous to the current groundfish stock by some, there is evidence that the decline of fish stocks is not necessarily due to just overfishing but also the growing effect of climate change.¹⁹⁴ As discussed, the Gulf of Maine has seen a collapse in its fishing and it has been theorized that climate change is to blame.¹⁹⁵ Andrew Pershing, the chief scientific officer for the Gulf of Maine Research Center, stated that the Gulf of Maine was the most rapidly warming body of water in the world in the period between 2004 and 2013.¹⁹⁶ The gulf stream has been pushing more warm water into the Gulf of Maine which reduces the amount of cold water from entering from Canada.¹⁹⁷ In fact, over approximately the previous ten years, the Gulf of Maine has seen a 3.5 degree Fahrenheit increase in temperature.¹⁹⁸ This means that there have been fewer offspring

¹⁹⁰ Christie, *supra* note 22; 16 U.S.C. § 1801.

¹⁹¹ See Letter from West Coast Seafood Processors Ass’n, et al., to the Hon. Rob Bishop (date unknown) (on file with author).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *On Point: Vanishing Cod, Climate Change and Our Warming Oceans*, NAT’L PUB. RADIO (Nov. 3, 2015), <http://www.wbur.org/onpoint/2015/11/03/climate-change-warming-oceans-cod-fisher> [<https://perma.cc/P8FR-67TF>].

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* (Pershing stating that the numbers would still apply for 2006-2015).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

produced from female cod as well as young cod not surviving as well as they do in colder waters.¹⁹⁹

This leads one to believe that overfishing is hardly the only problem along our coasts. Certainly overfishing has been a problem in years past but climate change is clearly a factor to be considered. The critics of H.R. 1335 believe that the bill will set back fishing stocks and put the fish in peril when overfishing is clearly not the only problem to be considered.²⁰⁰ Indeed, climate change can be blamed for several issues in the ocean.²⁰¹ With the decreased cod population in the Gulf of Maine, lobster stocks have soared because juvenile lobsters are a food source for cod.²⁰² This has resulted in fishermen being more dependent on lobster than before and could now result in that stock being damaged if the cod population is not reformed.²⁰³ This affects both the local and regional economy, as warm years tend to produce a cheaper lobster due to demand, resulting in fishermen, and those buying from them, making less money; consequently, colder years, such as 2014, create a more stable economy.²⁰⁴ Due to an abundance of stock, and, therefore, more competitors selling great quantities, fishermen, dealers, and restaurants have to charge less than normal when selling lobsters to the public in order to meet demand, resulting in a lower profit.

Of course, H.R. 1335 is not intended to only benefit the New England region; indeed, its provisions would apply to the entire United States. For example, the southeast region of America has been greatly impacted by regulation on red snapper²⁰⁵ and H.R. 1335 would add

¹⁹⁹ *Id.*

²⁰⁰ Letter from West Coast Seafood Processors Ass'n, *supra* note 191.

²⁰¹ *Id.*

²⁰² *Id.* (interview with Bangor Daily News reporter Bill Trotter wherein he states that with a reduced stock of cod in the Gulf of Maine to keep lobsters in check, their population has soared).

²⁰³ *Id.*

²⁰⁴ *Id.* (2012 and 2013 were "warm water years" which upset the cycle of lobster then 2014 saw a return of cold temperatures which stabilized the economy for lobster.); *see also Warm ocean waters worry Maine lobstermen, industry, ASSOCIATED PRESS* (April 15, 2013) www.umaine.edu/marine/news/article/2013/04/15/warm_ocean_waters_worry_maine_lobstermen_industry [<https://perma.cc/FX73-QZHB>].

²⁰⁵ Christopher Hong, *Anglers Upset with Federal Limits on Red Snapper Designed to Boost Stocks*, FLA. TIMES UNION (Sept. 19, 2015, 2:00 PM),

provisions to improve upon the data collection pertaining to red snapper using modern technology and to divert funds received from NOAA to be used for research.²⁰⁶ Similar to the cod in New England, the red snapper is an important groundfish to the southeast and when the population of red snapper in the southern waters begins to dwindle, the effect is just as devastating. While this loss is devastating to the community, H.R. 1335 would implement an entire section to restocking red snapper.²⁰⁷ H.R. 1335 would benefit not just New England or the southeast; it would benefit the entire EEZ that America fishes in. In order to serve the fishing industry properly, environmental concerns such as catch limits need to be implemented. At the same time, conservation can only extend so far when a state economy relies upon this industry to support it. In a true meeting of the minds, H.R. 1335 provides for the best of both worlds.

V. CONCLUSION

*This bill is a win for consumers. It is a win for the industry that puts food on our tables. It is a win for the restaurants. It is a win for the recreational fishermen. It is a win for better and more transparent science. It is a win for our environment. It is a win for the American taxpayers. There is no significant increase in the cost, but there is a significant increase in the solutions in this area, which is, once again, why all the major players who were involved in this—both the commercial side, recreational side—are in common agreement that this is the way we need to go forward.*²⁰⁸

The fishing industry in New England is in need of legislative help to truly recover from the fishing disaster of 2012. To do this, they must be afforded the flexibility of H.R. 1335. This bill would allow the

<http://jacksonville.com/news/2015-09-19/story/anglers-upset-federal-limits-red-snapper-designed-boost-stocks> [<https://perma.cc/7WWF-Z8GK>].

²⁰⁶ See H.R. 1335, *supra* note 14, at § 13; see also *Section-by-Section Analysis*, GULF OF MEXICO FISHERY MGMT. COUNCIL, *supra* note 188.

²⁰⁷ See H.R. 1335, *supra* note 14, at § 13; see also *Section-by-Section Analysis*, GULF OF MEXICO FISHERY MGMT. COUNCIL, *supra* note 188.

²⁰⁸ *Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act*, 114th Cong. 3591, 3592 (2015) (statement of Rep. Bishop) (on file with author).

industry to make decisions as a region on the fisheries as opposed to being forced to have the same regulations as every other fishery in America. Fisheries would remain sustainable with the option of intervention on behalf of a species that is in trouble. Contrary to what many in opposition seem to believe, fishermen do not actually want the oceans to become empty of fish as they rely upon these fish for their livelihood. Bill H.R. 1335 allows for both the conservation groups and the fishing industry to be happy and should be enacted.